WEE KOK BIN

v.

ASEAMBANKERS MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[SUIT NO: D2-22-962-2005]
20 APRIL 2010

CIVIL PROCEDURE: *Subpoena - Setting aside - Application for - Whether issue of subpoenas constituted an abuse of court process - Calling of witnesses - Whether opposing party allowed to interfere with selection, choice and order of witnesses - Whether there was sufficient cause to issue subpoenas ad testificandum against two proposed witnesses - Whether court satisfied subpoenas made bona fide*

The defendant in this action applied by summons in chambers to set aside two writs of subpoena ad testificandum served on the present chairman of the defendant and one of its directors, namely Tan Sri Dato' Megat Zaharuddin and Dato' Sri Abdul Wahid Omar. The plaintiff was a remisier appointed by the defendant under an agreement dated 15 April 1999 and dismissed from this position on 18 January 2005. During this material period, both persons had not been appointed to the respective positions mentioned above. The circumstances leading to the plaintiff's termination as remisier were central issues in this action. In making this application, the defendant took the position that both persons had no knowledge or ability to give evidence on the relevant issues and indeed any statement made by them in evidence would be merely hearsay and therefore would have no evidential value to the plaintiff's case. Such being so, the defendant submitted that the issue of the subpoenas constituted an abuse of the court's process and effected for collateral purpose having no reference or connection to the justice of the case. The plaintiff argued that these two witnesses were amongst the important witnesses who would be called to give evidence to assist the plaintiff's case. Further, these two persons were being subpoenaed as witnesses for the plaintiff and not for the defendant, and they were being subpoenaed in their position and capacity in the defendant bank, and not in their personal capacity.

Held (dismissing defendant's application):

(1) As a matter of principle, the selection, choice and order of witnesses should be left to the party calling them, be it the plaintiff or defendant. It cannot be right to allow an opposing party to interfere with this right, unless in very exceptional circumstances. It was not right to allow the defendant to speak for the persons would have been subpoenaed, and by this token to second-guess the evidence which they could or would give during the trial. In the course of the trial, defendant's counsel would of course be free to object to the evidence on the normal grounds of relevancy, materiality and admissibility. There should be no prejudice caused to the defendant if these two persons were subpoenaed to give evidence. It would be up to these two persons to satisfy this court that the subpoenas against them were an abuse of the court's process and done for collateral and oppressive purposes, since they had no useful evidence to offer. This, with due respect, had not been said by any of them. On the evidence and arguments presented, the plaintiff had made out a sufficient case to issue the subpoenas ad testificandum against the two proposed witnesses. There was no evident abuse of the court's process, and no ground to suspect any absence of *bona fides* on his part in issuing the two subpoenas. (paras 5 & 9)

Case(s) referred to:

Ismail v. Hasnul & Another Appeal [1967] 1 LNS 60 FC ***(refd)***

Keruntum Sdn Bhd v. The Director of Forests & Ors [1997] 1 LNS 143 HC ***(refd)***

Marcel and Others v. Commissioner of Police of the Metropolis and Others [1991] 1 All ER 845 ***(refd)***

Senja Cerah Sdn Bhd v. Sisprop Sdn Bhd; Tan Sri Cheng Heng Jem & Ors (Applicants) [2009] 7 CLJ 256 HC ***(refd)***

Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 SC ***(refd)***

For the plaintiff - Robert Devan (Annie Varghese with him); M/s Robert Devan & Co

For the defendant - Sunther Thulasi (Norashikin Mansor with him); M/s Affendi Zahari

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamad Ariff Yusof J:

[1] The defendant in this action applies by summons in chambers to set aside two writs of *subpoena ad testificandum* served on the present chairman of the defendant and one of its directors, namely Tan Sri Dato' Megat Zaharuddin and Dato' Sri Abdul Wahid bin Omar. The plaintiff here is a remisier appointed by the defendant under an agreement dated 15 April 1999 and dismissed from this position on 18 January 2005. During this material period, both persons had not been appointed to the respective positions mentioned above. In point of fact Tan Sri Dato' Megat Zaharuddin was appointed chairman only on 26 January 2010, while Dato Sri Abdul Wahid was appointed as a director only on 9 July 2008.

[2] The circumstances leading to the plaintiff's termination as remisier and the losses allegedly occasioned and caused by him are central issues in this action. In making this application, the defendant takes the position both persons have no knowledge or ability to give evidence on the relevant issues and indeed any statement made by them in evidence will be merely hearsay and therefore will have no evidential value to the plaintiff's case. The defendant argues by reference to a study of the bundle of pleadings and bundle of documents filed in this action, there is not a single reference being made to either of these two persons. Such being so, the issue of the *subpoenas* constitutes an abuse of the court's process and effected for collateral purpose having no reference or connection to the justice of the case. These arguments and statements appear in the affidavit in support (encl. 34) affirmed by Faudziah binti Ismail, an officer and company secretary of the defendant bank.

[3] In the affidavit in reply affirmed by counsel for the plaintiff on his behalf, the plaintiff argues these two witnesses are amongst the important witnesses who would be called to give evidence to assist the plaintiff's case. Further, these two persons are being subpoenaed as witnesses for the plaintiff and not for the defendant, and they are being subpoenaed in their position and capacity in the defendant bank, and not in their personal capacity. They are, additionally, the immediate successors to the persons who were previously the chairman and director and the

defendant's bank, and as such hold important positions in the defendant bank and therefore would have knowledge and access to files and documents relating to this case. That being so, they will be in the position to give evidence in this court, and it will be up to them during the course of the testimony to either confirm or deny the facts.

[4] The present application to set aside, it is to be noted, is filed by the defendant, not these two persons. Two points, according to the plaintiff, arise here: first, the defendant has no locus to set aside since the *subpoenas* are issued, not by the defendant and secondly, the application by the defendant suffers from a conflict of interest in a manner prejudicial to the plaintiff's interest. The affidavit in support of the summons in chambers to set aside, as has already been noted earlier, is affirmed by an officer and company secretary of the defendant bank. These two persons subpoenaed have not affirmed any affidavit to raise or confirm the points made in the affidavit in support. At least from the record, either of these two persons has not raised any objection. An immediate issue therefore concerns whether it is possible for the defendant itself, who is obviously a direct party to this litigation, to apply to set aside these *subpoenas*?

[5] As a matter of principle, it seems plain that the selection, choice and order of witnesses should be left to the party calling them, be it the plaintiff or defendant. It cannot, it seems to me, to be right to allow an opposing party to interfere with this right, unless in very exceptional circumstances. I do not believe it is right to allow the defendant to speak for the persons would have been *subpoenaed*, and by this token to second-guess the evidence which they can or will give during the trial. In the course of the trial, defendant's counsel will of course be free to object to the evidence on the normal grounds of relevancy, materiality and admissibility. In short, there should be no prejudice caused to the defendant if these two persons are subpoenaed to give evidence. It will be up to these two persons to satisfy this court that the subpoenas against them are an abuse of the court's process and done for collateral and oppressive purposes, since they have no useful evidence to offer. This, with due respect, has not been said by any of them.

[6] In the course of submission, I was referred to a decision of the chancery division, namely *Marcel and Others v. Commissioner of Police of the Metropolis and Others* [1991] 1 All ER 845, for the proposition that a third party can also apply to set aside a subpoena. As the facts in Marcel will show, the principle established does not seem to be one of general application. The *subpoena* in question in Marcel was issued on the police to produce information and documents obtained by seizure in the course of investigation and prosecution of crime. It was held by the chancery division that the police could not be compelled to disclose seized documents to a party to enable him to use the documents in civil proceedings. The principle seems to be, and rightly so, that a third party can apply to set aside a subpoena if that third party can establish "his legal rights will be interfered with by the execution of the *subpoena*." This rationale appears very clearly on p. 855 of the report:

> ... Mr Serota submits that only the person on whom the *subpoena* is served has *locus standi* to apply to set it aside. I was not referred to any case where a third party has made such an application. But I can see no reason why any person whose legal rights will be interfered with by the execution of the *subpoena* should not be heard. Say a former, disillusioned, member of the security services ... was subpoenaed to produce secret documents and chose not to resist such *subpoena*. Can it be seriously thought that the Crown would be held to have no *locus standi* to apply to set aside the *subpoena* or otherwise object to the production of the secret documents?
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> ... the Plaintiffs ... have the right to apply to preserve the confidentiality of their documents either by setting aside the *subpoena* altogether or by limiting the documents to which it applies ... (per Browne-Wilkinson V-C)

[7] I do not believe the principle cited above can be extended to cover the position of the defendant in this present application. What "legal rights deserving of protection will be interfered with"? As I have alluded to earlier, the defendant will be at liberty to object to the evidence as and when they are given, and if the court should be with the defendant, to have the objectionable items excluded or expunged.

[8] In the course of submission too, several local cases were cited before me, and in all these cases the application to set aside was filed by the persons subpoenaed. In *Keruntum Sdn Bhd v. The Director of Forests & Ors* [1997] 1 LNS 143, for instance, where the applicant, Tan Sri Ting Peck King, was the person subpoenaed. That said, the Malaysian courts have laid down the basic principle on setting aside as being the party issuing the *subpoena* has to show the materiality of the witness for the just decision of the case, and in that this outweighs any oppression that may be caused to the party objecting: *Senja Cerah Sdn Bhd v. Sisprop Sdn Bhd; Tan Sri Cheng Heng Jem & Ors (Applicants)* [2009] 7 CLJ 256. The court, of course, "possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case to restrain its abuse": *Ismail v. Hasnul & Another Appeal* [1967] 1 LNS 60. See also *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345.

[9] On the evidence and arguments presented, I am satisfied the plaintiff has made out a sufficient case to issue the *subpoenas* ad *testifcandum* against the two proposed witnesses. There is no evident abuse of the court's process, and no ground to suspect any absence of *bona fides* on his part in issuing the two *subpoenas*.

[10] In the circumstances, I dismiss this application by the defendant to set aside the *subpoenas* with costs of this application of RM1,000 to be paid by the defendant to the plaintiff within 14 days from the date of this order.